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**IN THE
COURT OF APPEALS OF INDIANA**

DEREK MOORE,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0604-CR-194

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0410-FB-184033; 49G06-0410-FB-187118

December 4, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Derek Moore (Moore), appeals his conviction for four counts of robbery, all Class B felonies, Ind. Code § 35-42-5-1, three counts of unlawful possession of a firearm by a serious violent felon, all Class B felonies, I.C. § 35-47-4-5, and two habitual offender charges.

We affirm.

ISSUES

Moore raises two issues on appeal, which we restate as:

- (1) Whether the trial court abused its discretion when it denied Moore's motion to withdraw his guilty plea at his sentencing hearing; and
- (2) Whether the trial court's refusal to grant a continuance for Moore to consult with his counsel and to prepare evidence for his sentencing hearings denied Moore's right to effective assistance of counsel.

FACTS AND PROCEDURAL HISTORY

On September 22, 2004, Moore entered the 62nd Street Village Pantry convenience store in Indianapolis, Indiana, requested the clerk to make change for him, and proceeded to spray the clerk's face with an irritant when she opened the cash register drawer. Moore removed approximately \$107.00 from the register and escaped the store.

On September 25, 2004, Moore entered the 52nd Street Seven-Eleven convenience store and requested a pack of cigarettes. As the clerk was ringing up the transaction, Moore pulled a handgun on her and escaped from the store with \$90.00 from the register.

On September 27, 2004, Moore entered a Subway restaurant when it was being opened and asked for two cookies. As the cookies were being prepared, Moore pulled a gun, pointed it at the clerk's head, demanded money from the register, and fled with a handful of cash.

Finally, on October 3, 2004, Moore entered the 16th Street Village Pantry convenience store. He placed a bag of Cheez-Its, along with a gun, on the counter and demanded money from the cash register. Moore fled with \$404.78 from the register.

On October 8, 2004, in cause number 49G06-00410-FB-184033, Moore was charged with robbery, a Class B felony, I.C. § 35-42-5-1; unlawful possession of a firearm by a serious violent felon, a Class B felony, I.C. § 35-47-4-5; carrying a handgun without a license, a Class A misdemeanor, I.C. § 35-47-2-1; and carrying a handgun without a license, a Class C felony, I.C. § 35-47-2-1. On October 14, 2004, in cause number 49G06-00410-FB-187118, Moore was charged with three counts of robbery, all Class B felonies, I.C. § 35-42-5-1; battery, a Class C felony, I.C. § 35-42-2-1; two counts of unlawful possession of a firearm by a serious violent felon, Class B felonies, § 35-47-4-5; two counts of carrying a handgun without a license, I.C. § 35-47-2-1, Class A misdemeanors; and two counts of carrying a handgun without a license, Class C felonies, I.C. § 35-47-2-1. Moore initially pled not guilty to all charges. On February 13, 2006, a jury trial commenced. After jury selection was completed, Moore indicated a desire to enter into a plea of guilty. Pursuant to the plea agreement, Moore pled guilty to all robbery and unlawful possession of a firearm by a serious violent felon charges under

both cause numbers, in addition to a plea of guilty to a habitual offender charge in each case.

Before it accepted Moore's guilty plea, the trial court conducted a guilty plea hearing. During this hearing, Moore was read the counts to which he was pleading guilty, admitting the truth to each, and pled guilty to each count. The State then established the factual basis for each crime by reading the details of each count into the record. After entering a judgment of conviction, the court set sentencing for March 2, 2006.

On March 1, 2006, Moore's counsel filed a motion to continue sentencing on Moore's behalf. The court granted the motion and rescheduled sentencing for March 16, 2006. On March 15, 2006, Moore filed a *pro se* Petition to Withdraw Guilty Plea and Counsel. Moore's motion to withdraw his guilty plea was denied. The trial court advised that the issue of counsel would be addressed at the sentencing hearing on the next day.

On March 16, 2006, the trial court permitted Moore's privately retained counsel to withdraw after notifying the trial court that Moore had filed a disciplinary complaint against him. The trial court reappointed Moore's public defender, who had initially represented Moore prior to Moore retaining private counsel. The trial court again considered Moore's motion to withdraw his guilty plea. During the hearing, the trial court permitted Moore's public defender to argue, on Moore's behalf, the motion to withdraw guilty plea; the trial court again denied the motion. Moore's counsel argued sentencing on Moore's behalf, after which the trial court sentenced Moore to a total of sixty years in prison.

Moore now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Moore contends that the trial court abused its discretion by denying his motion to withdraw his guilty plea. He further contends the trial court denied him his right to effective assistance of counsel by refusing to grant his request for continuance to allow him time to consult with his newly appointed attorney prior to sentencing. We disagree.

I. Withdrawal of Guilty Plea

Under I.C. § 35-35-1-4, the court is *required* to grant a request to withdraw a guilty plea before sentencing only if the defendant proves that withdrawal of the plea “is necessary to correct a manifest injustice.” *Coomer v. State*, 652 N.E.2d 60, 61-62 (Ind. 1995). The court must *deny* a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. *Id.* Except under those polar circumstances, disposition of the petition is within the sound discretion of the trial court and will be reversed only for abuse of discretion. *Id.*; *Hollingsworth v. State*, 717 N.E.2d 610 (Ind. Ct. App. 1999), *trans. denied*. “Manifest injustice” and “substantial prejudice” are necessarily imprecise standards, and an appellant seeking to overturn a trial court’s decision faces a high hurdle under I.C. § 35-35-1-4 and its predecessors. *Coomer*, 652 N.E.2d at 62. The trial court’s ruling on a motion to withdraw a guilty plea arrives in this court with a presumption in favor of the ruling. *Id.*¹

¹ Citing *Fletcher v. State*, 632 N.E.2d 1164 (Ind. Ct. App. 1994), Moore argues that the trial court should have continued the matter and held a separate hearing on his motion to withdraw his guilty plea. However, I.C. § 35-35-1-4 contains no express requirement for a hearing. *Fletcher v. State*, 649 N.E.2d

We conclude in this case that the trial court exercised appropriate discretion in denying Moore's request to withdraw his guilty plea. The record establishes that the withdrawal of the guilty plea would not have resulted in substantial prejudice to the State. Further, Moore has not established *manifest injustice* that must be corrected. In fact, prior to the commencement of the sentencing hearing on March 16, 2006, following Moore's submission of his Petition to Withdraw Guilty Plea and Counsel on March 15, 2005, the trial court reviewed the State's evidence that would have been presented during trial, and confirmed there was no manifest injustice to Moore by denying his motion to withdraw his guilty plea. Therefore, the trial court was neither required to grant nor deny Moore's request. The decision was wholly within the trial court's discretion.

Additionally, in determining whether a trial court has abused its discretion in denying a motion to withdraw a guilty plea, we examine the statements made by the defendant at his guilty plea hearing to decide whether his plea was offered "freely and knowingly." *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001). The record reveals that the trial court closely questioned Moore during the guilty plea hearing:

[TRIAL COURT]: Now, one of the questions that I have to ask you in any guilty plea proceeding, usually I ask it at the end, but this time I'm going to ask it in the beginning...when you plead guilty your plea has to be of your own free will, a voluntary act, and are you wanting to enter this plea because it is of your own free will?

[MOORE]: Yeah.

(Tr. 108). The trial court further inquired:

1022, 1023 (Ind. 1995). We strongly encourage Appellant's counsel to Shephardize her cases before citing them to this court.

[TRIAL COURT]: Well, I need to know if...you want to go forward and see what happens with the trial. You certainly can. If you want to enter this plea of your own free will knowing that it will give you some certainty about how this is all going to come out, that's fine and we'll go forward.

[MOORE]: Yes.

[TRIAL COURT]: You want to do the plea?

[MOORE]: Yes.

[TRIAL COURT]: All right.

(Tr. 111). The trial court went on to clarify:

[TRIAL COURT]: This isn't the first time I've had somebody plead guilty after we've had a conversation that he wasn't satisfied with his attorney. But my response to that is, is it nevertheless your intention and voluntarily free will to enter the plea today.

[MOORE]: Is it my, is it my will to plead guilty?

[TRIAL COURT]: Yes.

[MOORE]: It is my will to plead guilty. I think it's in my best interest. I have no other choice.

(Tr. 112-13).

The record clearly supports that Moore understood the consequences of his plea. He understood the allegations to which he was pleading guilty, he knew about his right to trial, the trial court advised him of the broad range of years to which he could be sentenced to help him appreciate the sentencing ramifications of admitting guilt, and his decision to plead guilty was made with the benefit of counsel.

Despite Moore's strained relationship with his attorney, which was made known to the trial court, and addressed during the plea hearing, Moore freely and knowingly made

the decision to proceed with the guilty plea. Moreover, Moore did not file his Petition to Withdraw Guilty Plea and Counsel for over a month following his plea of guilty. Also, this *pro se* Petition alleging “a conflict of interest and...[animosity] between attorney and client,” which could have been filed at any time following the guilty plea hearing, was not filed until fifteen days after the same attorney had filed a Motion for Continuance of the sentencing hearing on Moore’s behalf.

Based on the evidence before us, we are satisfied that the trial court did not abuse its discretion in denying Moore’s motion to withdraw his guilty plea. The statements made at the guilty plea hearing adequately demonstrate that Moore voluntarily and knowingly pled guilty. Although Moore had previously made known his dissatisfaction with his attorney, Moore convinced the trial court that he fully understood the ramifications of pleading guilty and that his decision was not prompted by undue pressure.

II. *Denial of Request for Continuance*

We now turn to Moore’s claim that the trial court denied him his right to effective assistance of counsel when the trial court refused to grant his request for continuance to allow him time to consult with his newly appointed attorney prior to sentencing. We find this claim without merit and reject it.

The Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defen[s]e.” Moreover, a strong presumption arises that the defendant’s counsel rendered adequate assistance and exercised reasonable professional judgment. *Collier v. State*, 715

N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*. To establish a violation of the Sixth Amendment right to effective assistance of counsel, one must show that (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Carr v. State*, 728 N.E.2d 125, 131 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 94 (1984)). The failure to establish either prong causes the entire claim to fail. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999), *reh'g denied*. Here, Moore has failed to establish either of the two prongs; therefore, his entire claim fails.

The record shows that the trial court initially assigned a public defender to Moore's case. Moore thereafter dismissed the public defender when he hired private counsel to represent him. However, Moore was not satisfied with his retained attorney's services either and, on March 15, 2006, requested that this attorney also be withdrawn from his case. The trial court then reassigned Moore's original public defender to represent him during the sentencing hearing.

Although the public defender had not been involved in Moore's case for some time, the record reflects that he still had knowledge of the status of the proceedings. The public defender was present at the plea hearing on February 13, 2006, at the trial court's request, and had the opportunity to consult with Moore prior to the sentencing hearing on March 16, 2006.

The record shows that the public defender objected to proceeding with sentencing on March 16, 2006, merely to "preserve the record." (Tr. 179). Contrary to what Moore

would have us believe, the public defender was, in fact, prepared to proceed with sentencing that day:

[PUBLIC DEFENDER]: ...Your Honor, my client's only concern...with proceeding today...is that I have been off the case for some time now and am being reappointed today. And my decision as his attorney, especially given the fact that I agree with the [c]ourt that the ruling that was just made is probably not a final order until such point in time as there is a sentencing in this particular situation, I'm prepared to argue for him today. We do not have any witnesses. I do not expect our situation as far as arguing sentencing to change between now and two weeks from now. So, I would like to proceed as his counsel of record today with sentencing.

(Tr. 180-181). Thus, it is clear the public defender was not seeking an actual continuance of the sentencing hearing from the trial court, but was merely preserving the record. Therefore, we conclude that Moore failed to establish that his counsel's performance fell below an objective standard of reasonableness or that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Accordingly, we find the record does not support a finding that Moore's right to effective assistance of counsel was denied by the trial court.

CONCLUSION

Based on the foregoing, we find the trial court properly denied Moore's Motion to Withdraw Guilty Plea and request for continuance.

Affirmed.

BAILEY, J., and MAY, J., concur.